

LEGISLATION ADVISORY COMMITTEE SEMINAR 29 SEPTEMBER 2010

HOW TO USE THE LAC GUIDELINES

Paper by Professor John Burrows

INTRODUCTION

- 1 The LAC Guidelines are available in electronic format at <http://www.justice.govt.nz/lac/index.html>. They date back to 1987 and have been frequently updated. There were major updates in 2001, 2003 and 2007 when new chapters were added.
- 2 The Guidelines are guides to making good legislation. They deal with both process and content.
- 3 The Guidelines have been written by members of the LAC and experts from outside the committee. They have been approved by Cabinet, which requires that proposals for legislation comply with them.
- 4 If a bill is introduced which does not comply with the Guidelines it risks attack in Parliament and in submissions to select committee. If the legislation is passed which does not comply there can be consequences. For example:
 - The legislation may give rise to problems which have to be resolved in the courts, and not always with the outcome which framers had hoped for.
 - The legislation may give rise to problems in implementation.
 - The legislation may lose the respect of those subject to it.
5. The guidelines are in three parts. The first deals with the process; the second with consistency between the legislation in question and the rest of the legal system; the third with particular issues which can give rise to difficulty.
6. The chapters of the Guidelines all follow a similar pattern:
 - Background explanation
 - A statement of the issues
 - An analysis of each issue in turn, which outlines the issue, comments on it, and provides guidance

SECTION I – PROCESS

Chapters 1 and two deal with matters of desirable process. Some of the main points are:

- The policy objectives of the legislation must be clearly defined.
- Is this legislation necessary? Could the objectives be achieved without it?
- Has there been adequate consultation within government and with those likely to be affected by the proposals?
- Has adequate time been allowed to prepare the legislation properly?
- Have the departmental lawyers been appropriately involved?

SECTION II – CONSISTENCY WITH THE REST OF THE LEGAL SYSTEM

This is an extremely important consideration. The new act must share a bed with many other inhabitants. It should fit comfortably with those others, and not cause conflict or inconsistency.

This means that those who prepare legislation must be familiar with other relevant law. So:

(i) Other statutes

The new act should be in harmony with other relevant acts.

- Other acts may perform a similar function, which may raise the question of whether the new act is necessary at all.
- Other acts may be inconsistent with the proposed legislation. One or the other may need to be changed. Other acts, although not outright inconsistent, may have different philosophies or approaches. Consideration may have to be given to amending them. In the long term attention may have to be given to tidying up to the whole area, otherwise the public may get the impression that there is no principle in it.
- It is also of critical importance to know how the proposed Act relates to any legislation it is going to replace, and how the transition between the old and the new is going to work.

(ii) Some special acts

- The legislation should be consistent with the New Zealand Bill of Rights Act 1990.
- It is not possible to overstate the importance of the Interpretation Act 1999. It is not entirely, or even principally, about interpretation. It also contains: -standard definitions of common terms, so that there is no need to repeat them in other acts; default rules about such things as

the effect of repeal, which operate in the absence of express transitional provisions; important rules about such things as appointment to office; the exercise of powers before an act comes into force; and the source of authority of regulations.

(iii) Common law

The interaction between common law and statute can be problematic. For example our statutes on the law of contract demonstrate an uneasy relationship between the legislation and the common law which has supposedly been replaced by them

(iv) Fundamental principle

Our legal system has at its heart some basic values: individual liberty, respect for private property, natural justice, access to the courts, the importance of vested rights, and an antipathy to retrospective legislation. Legislation should not, without the very best reasons, depart from these principles. Some of these longstanding principles are now in the Bill of Rights Act, but by no means all of them.

(v) Treaties

Many acts implement international treaties; others are on topics which are covered by international treaties. Care must be taken to ensure that such acts are not inconsistent with our international obligations. Likewise, consistency with the Treaty of Waitangi is fundamentally important.

(vi) Statutory interpretation

When preparing and drafting legislation it is important to bear in mind the way a court is likely to interpret it should there be litigation. Chapter 3A deals with the subject. It sets out the rules for, and approaches to, statutory interpretation adopted by the courts.

SECTION III – PARTICULAR ISSUES

There are a number of perennially difficult issues. The last section of the Guidelines (which is the largest) outlines some of them and offers guidance as to how to deal with them.

Currently the Guidelines deal with the following topics:

- Creation of a new public power
- Creation of a new public body
- Delegation of a lawmaking power
- The exercise of delegated powers
- Remedies
- Criminal offences
- Appeal or review
- Powers of entry and search
- Powers to require and use personal information.

- Cross-border issues
- The passage of a Bill through the House
- Alternative dispute resolution

The typical approach of each chapter is to formulate the issues which present themselves in that topic, the things to be taken into account in dealing with them, and guidelines to ensure that sound principle is followed. Some of the topics are of considerable importance, and involve basic issues of the rule of the law.

I shall take as an example chapter 10, which deals with delegated legislation. The issues with which it deals are:

Part 1: Is it appropriate for primary legislation to contain a delegation of legislative power? Part 2: What procedures should be specified to control the process in making the delegated legislation? Part 3: To whom should the delegation be made? Part 4: Is a provision for “deemed regulations” appropriate? Part 5: Is a provision for the “subdelegation” appropriate? Part 6: Is the use of “incorporation by reference” appropriate? Part 7: If the legislation includes a power to give policy directions, has appropriate process been followed?

One of the most important of the issues is the first: what should go in the Act, and what in delegated legislation? Generally speaking it can be said that the Act should contain policy and principle, whereas delegated legislation is appropriate for matters of minor detail and machinery. But that is the roughest of guides and it is often a matter of real contention where the line should be drawn. Some matters should always be in the Act: provisions impinging on human rights; the creation of a tax; the creation of a serious criminal offence, for instance. This part of the chapter gives guidance on these matters. It is also a very important question as to whether the delegated legislation should take the form of regulations made by the Governor-General by Order in Council, or whether it is appropriate to confer the power on someone else – a minister, an official or a regulatory agency (such as the Commerce Commission). If an instrument other than regulations is chosen, there is then a question of what controls, checks and balances should be put in place: should the product be deemed to be a regulation for the purpose of disallowance and publication in the SR series, or is there no need for this? If not, what other controls are there to be?

This is simply one example of how the guidelines work. Other chapters, and indeed other parts of this chapter 10, deal with similar thorny but fundamental questions.

DISCUSSION

- 1 The Guidelines on different topics differ in specificity, depending on their subject matter. Some are quite prescriptive, some are more in the nature of recommendations; some list factors to be taken into account when deciding on an appropriate legislative provision. However the topics covered are all important. In many cases they are of fundamental constitutional significance and go to ensure that power is properly controlled; in others they touch on basic issues of human rights and fairness. If the Guidelines are not complied

with, the resulting legislation will be open to objection. It is likely to be attacked in select committee and the House. If it is eventually enacted it is likely to cause problems for those affected by it, and may be subject of adverse decision in the courts.

- 2 The Guidelines are aimed at a wide audience: everyone involved in the preparation of legislation, from the earliest stages of policy development to the actual drafting of the Bill. The Guidelines remain relevant when preparing amendments in Parliament. Early elimination of problems ensures smoother passage. It is not good practice to assume that if there is something amiss in a proposal it will be sorted out further down the track.

So everyone should be aware of the Guidelines, and it is important for every department and agency involved in the preparation of legislation to have some staff who are thoroughly versed in them.

- 3 The Guidelines are long, and are getting longer every year. They are sometimes criticised because of their bulk. It has been suggested that they should be abbreviated, and the LAC is embarking on that exercise. But to do that is not easy, and will take some time. Summaries, valuable as they are, risk leaving too much out, and summaries of principles are sometimes hard to follow unless one has an explanation of why the principles exist as they do. The discussion in the Guidelines adds value, and is, on many topics, not available anywhere else. They are a unique resource. The proposed summary will have to be in addition to them, and not instead of them.

Despite their size, they are not so hard to use:

- In each chapter the actual Guidelines themselves are relatively briefly stated. They are, effectively, a summary. You can see them at a glance, and then refer back to the further explanations elsewhere in the relevant chapter.
 - There is an index.
 - There is a checklist at the beginning of the volume. It is a simple step-by-step list of the matters you need to be careful of where preparing legislation. The headings in the checklist alert you to problems you need to follow up.
4. The Guidelines are a work in progress. New topics are always coming on the scene on which guidance is needed. One which LAC is currently working on is provisions which confer power to exempt from legislation.